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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN MEJIA, Defendant and Appellant.	B259843 (Los Angeles County Super. Ct. No. VA129329)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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Juan Mejia (defendant) challenges the trial court's imposition of a five-year gang enhancement to his sentence on the ground that there was insufficient evidence to support the jury's finding that one of the "primary activities" of his criminal street gang was the commission of the qualifying statutory crimes. We conclude there was sufficient evidence, and affirm.

FACTS AND PROCEDURAL BACKGROUND

In March 2013, defendant was pulled over for a Vehicle Code violation and, after defendant consented to a search of the car, police found a loaded .45-caliber handgun in the trunk. Defendant admitted the gun belonged to him.

In August 2013, several members of the Orange Street Locals (OSL) street gang confronted, challenged and assaulted Juan Maldonado and his cousin in the courtyard of an apartment complex located in the middle of OSL gang territory—all while yelling the name of their gang. Defendant ended the confrontation by pointing a sawed-off shotgun at Maldonado's head. When Maldonado's sister recognized defendant and called out his gang moniker, defendant fled while yelling, "Orange Street, come on fool, come on."

In October 2013, defendant was found in possession of a loaded, sawed-off M-1 carbine rifle.

The People charged defendant in separate cases, but consolidated them into a single charging document. In the operative, second amended information, defendant was charged as follows: As to the first incident, he was charged with (1) carrying a concealed firearm in a vehicle (Pen. Code, § 25400, subd. (a))[1]; (2) being a felon in possession of a loaded firearm (§ 25850, subd. (a)); and (3) being a felon in possession of a firearm (§ 29800, subd. (a)(1)). As to the second incident, he was charged with (1) assaulting Maldonado with a firearm (§ 245, subd. (a)(2)), (2) assaulting Maldonado with a semi-automatic firearm (§ 245, subd. (b)), and (3) being a felon in possession of a firearm (§ 29800, subd. (a)(1)). As to the third incident, he was charged with being a felon in

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1 All further statutory references are to the Penal Code unless otherwise indicated.

possession of a firearm (§ 29800, subd. (a)(1)). The People also alleged a number of enhancements, including (1) that the two assaults were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(B)), (2) that defendant personally used a firearm in the assaults (§ 12022.5, subd. (a)), (3) that defendant was on bail while committing the assaults (§ 12022.1), (4) that defendant had three prior convictions that qualified as "strikes" under California's Three Strikes Law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and (5) that defendant had two prior "serious" felony convictions (§ 667, subd. (a)(1)). During trial, the People voluntarily dismissed the felon in possession of a loaded firearm charge from the first incident, as well as the enhancements for gang involvement and personal use of a firearm as to the felon in possession charges from the second and third incidents.

After the jury convicted defendant of all remaining counts and found all allegations to be true, the trial court sentenced defendant to prison for 40 years and eight months. After granting defendant's motion to strike two of his three prior "strike" convictions, the court calculated defendant's sentence by imposing: (1) 18 years, as the base sentence, for the assault on Maldonado with a semi-automatic firearm (nine years, doubled due to the remaining "strike" conviction); (2) consecutive sentences of three, five, two and ten years on the base count for defendant's personal use of a firearm, the gang enhancement, committing the assault while on bail, and having two prior "serious" felony convictions, respectively; (3) a consecutive sentence of 16 months for carrying a concealed firearm in a vehicle (one-third the middle term of 24 months, doubled due to the prior "strike" conviction); and (4) a consecutive sentence of 16 months for being a felon in possession in the third incident (one-third the middle term of 24 months, doubled due to the prior "strike" conviction). The court also imposed, but stayed under section 654, sentences of two years and three years for the felon in possession and assault with a firearm convictions arising out of the second incident, and a sentence of two years for being a felon in possession of a firearm arising out of the first incident.

Defendant timely appeals.

DISCUSSION

Defendant challenges the sufficiency of the evidence supporting the jury's finding that he committed the assault with a semi-automatic firearm on Maldonado "for the benefit of, at the direction of, or in association with [a] criminal street gang." (§ 186.22, subd. (b)(1)(B).) More specifically, defendant asserts that the People did not adduce sufficient evidence to prove that the OSL qualifies as a "criminal street gang." To so qualify, the People must prove (1) that OSL is an organization, association or group of three or more persons sharing a common name or identifying sign or symbol, (2) that one of OSL's "primary activities" is the commission of at least one of 28 qualifying crimes listed in section 186.22, subd. (e), and (3) that OSL's members individually or collectively engage in a pattern of criminal gang activity. (§ 186.22, subd. (f); *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457 (*Duran*).) Defendant argues that the People never proved that one of the OSL's *primary* activities was the commission of statutorily enumerated (that is, qualifying) crimes.

For the commission of qualifying crimes to be one of a gang's "primary activities," the commission of those crimes must be "one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*).) Put differently, the People must prove that the gang's members "consistently and repeatedly" commit those crimes. (*Id.* at p. 324.) The "isolated" or "occasional" commission of those crimes is not enough. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611 (*Alexander L.*); *Duran*, *supra*, 97 Cal.App.4th at p. 1465.) There are many ways to prove that a gang's commission of qualifying activities is one of its "primary activities": (1) the People can prove that individual gang members have consistently and repeatedly committed qualifying crimes (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1225-1226 [commission of three crimes by a small gang during a three-month period; sufficient]; cf. *In re Jorge G.* (2004) 117 Cal.App.4th 931, 945 [commission of a single crime; insufficient]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 [commission of three qualifying crimes, including the charged crime, within one

week as well as another qualifying crime six years earlier; insufficient]), and the tally may include the defendant's commission of the charged offense (*Duran*, at p. 1465); (2) the People can prove that the gang's primary purpose is to instill fear and to intimidate, and that gang members have committed qualifying crimes to create such fear and intimidation (*ibid.*); or (3) a gang expert can offer an opinion on the gang's primary activities (*People v. Gardeley* (1996) 14 Cal.4th 605, 620; *Sengpadychith*, at p. 329; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330).

In evaluating whether the People in this case have adduced sufficient evidence that one of OSL's primary activities is the commission of qualifying offenses, our task is to assess whether the evidence is sufficient to enable a rational trier of fact to find this element beyond a reasonable doubt. (*People v. Rios* (2013) 222 Cal.App.4th 542, 559.) In evaluating the evidence, we are required to "review *all of the evidence*" presented at trial. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1412.) We are to view that evidence in the light most favorable to the jury's finding, and draw all reasonable inferences in favor of that finding. (*Rios*, at p. 564.)

In this case, the People introduced evidence that OSL gang members have committed several qualifying offenses. The People's gang expert, Los Angeles County Sheriff's Deputy gang investigator Sergio Reyes, testified that he had investigated several crimes "committed" by OSL gang members, including robberies, narcotics sales, burglaries, carjackings, assaults with deadly weapons, petty thefts, and attempted murders. Except for petty theft, all of these crimes are qualifying offenses. (§ 186.22, subds. (e)(2) [robbery], (e)(4) [sale of controlled substances], (e)(11) [burglary], (e)(21) [carjacking], (e)(1) [assault with a deadly weapon], (e)(3) [murder, including attempted murder].) The People also introduced evidence that an OSL gang member had committed a burglary in 2012, that another OSL member had committed an unlawful taking or driving of a vehicle in 2013 (§ 186.22, subd. (e)(25) [unlawful taking; qualifying offense]), and that defendant had committed the charged assault with a deadly weapon in 2013. The expert also testified that "gang members" "primarily" "care . . .

about their reputation," which he said is enhanced through their commission of acts of violence. Robberies, carjackings, assaults with a deadly weapon and attempted murders are, by definition, acts of violence. (§§ 211, 459, 245, 187, 664.) The expert based his opinions on his 14 years as a sworn peace officer, the courses on gangs he has attended or facilitated, his conversations with gang members (including OSL gang members), his investigation of gang crimes (including crimes by OSL gang members), and his prior testimony as a gang expert. Defendant did not object to the expert's qualifications.

Under the authority discussed above, the above-enumerated evidence is more than sufficient to support the jury's finding that one of OSL's primary activities is the commission of qualifying offenses. Indeed, defendant never disputed it at trial. During his closing argument to the jury, defendant never addressed OSL's primary activities; instead of arguing that OSL was not a criminal street gang, he argued that the charged assault was not for the gang's benefit.

Defendant nevertheless raises two challenges to the sufficiency of the evidence on appeal. First, he argues that the gang expert's listing of offenses committed by OSL gang members is entitled to little weight because the expert was never asked whether—and did not testify that—they were one of OSL's *primary* activities. We disagree that the omission of the word "primary" from the prosecutor's question or the gang expert's answer is dispositive. Juries may draw reasonable inferences from the evidence presented (and, on review, we are required to presume they did (*People v. Whalen* (2013) 56 Cal.4th 1, 56, fn. 22)), and a jury can reasonably infer that the long list of qualifying crimes that the expert said OSL gang members "commit[]" take time to commit and that their commission thereby constitutes one of the gang's primary activities. (Accord, *People v. Margarejo* (2008) 162 Cal.App.4th 102, 106-108 [expert asked "what are primary activities" of gang and discussed the gang's "activities"; appropriate to infer that expert's answer referred to primary activities].)

Second, defendant contends that this case is indistinguishable from *Alexander L.*, *supra*, 149 Cal.App.4th 605, which overturned a gang enhancement for insufficient

evidence of the gang's primary activity. We disagree that *Alexander L.* is either analogous or dispositive. In *Alexander L.*, the gang expert opined that the gang members had committed "'quite a few assaults with a deadly weapon,'" including two assaults in one year, and had "'been involved in murders.'" (*Id.* at pp. 611-612, 614.) The court expressed doubt as to whether this evidence was sufficient by itself to prove that the commission of these offenses was one of the gang's primary activities, but reasoned that even if a jury could so infer, the expert's opinion lacked an adequate foundation in light of the expert's lack of familiarity with the gang at issue. (*Ibid.*) In this case, however, there was no contemporaneous objection to the expert's qualifications and, in light of the expertise detailed above, no basis to challenge those qualifications. Further, the evidence in this case consisted of more than just the expert's testimony as to which crimes gang members had committed; it also included the expert's further testimony that OSL gang members are "primarily" concerned with committing violent crimes and evidence that OSL members had committed several such crimes.

Our analysis is not, as defendant suggests, affected by the erroneous gang enhancement jury instruction given the in this case. That instruction properly informed the jury that it had to find that "one of [OSL's] primary activities [was] the commission of one or more of the following [qualifying] criminal acts," but then listed only one such act—namely, "assault with a deadly weapon." The court's listing of a single offense was erroneous because evidence of *any* qualifying offense committed by gang members "is relevant in determining the gang's primary activities" (*Sengpadychith*, *supra*, 26 Cal.4th at p. 323), and because the People had introduced evidence that OSL members had committed several qualifying offenses in addition to assaults with a deadly weapon.

This instructional error does not affect our substantial evidence review for two reasons. First, as noted above, we are charged with reviewing "all of the evidence" presented at trial. (*Miranda, supra,* 199 Cal.App.4th at p. 1412.)

Second, the chief limitation to the consideration of all evidence in a substantial evidence challenge—recognized in *People v. Kunkin* (1973) 9 Cal.3d 245 (*Kunkin*) and

People v. Smith (1984) 155 Cal.App.3d 1103 (*Smith*)—does not apply here. In *Kunkin* and *Smith*, the People urged the courts to reject substantial evidence challenges to theft convictions on theories of theft (having completely different elements) that were never presented to the jury. The courts refused, reasoning that a court "cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule." (*Kunkin*, at pp. 250-251 [jury instructed on theft by larceny; appellate court may not affirm on theory of theft by embezzlement]; *Smith*, at p. 1145 [jury instructed on theft by embezzlement; appellate court may not affirm on other theft theories].)

The rule announced in *Kunkin* and *Smith* is not applicable when an erroneous jury instruction mistakenly narrows what evidence a jury can consider as to a single element (or a sub-element) of a crime or enhancement. (But see *People v. Garcia* (2014) 224 Cal.App.4th 519, 525 [applying *Kunkin* and *Smith* to an instruction that unnecessarily narrowed what the jury could consider as evidence to support one element of a gang enhancement].) When the instructional error pertains to a single element (or sub-element) of a crime or enhancement, there is no danger of a directed verdict of guilt as to all of the elements of a crime, as there was in *Kunkin* and *Smith*. Moreover, extending *Kunkin* and *Smith* to this new context would place them in tension (if not outright conflict) with more recent cases from the United States and California Supreme Courts holding that instructional error involving the omission or misdescription of one or more elements of a crime (as long as it does not extend to "substantially all of the elements") can be harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 10, 17; *People v. Cummings* (1993) 4 Cal.4th 1233, 1315.) These newer cases contemplate that an appellate court may affirm a conviction based on overwhelming evidence presented at trial (which renders the error harmless beyond a reasonable doubt), even where the jury never actually considered whether that evidence established the omitted or misdescribed element. Under this reasoning, an appellate court is also empowered to ignore an impermissibly restrictive jury instruction as to an element and to

conduct a substantial evidence review based on all of the evidence, even though the jury did not. If this were not the case, the label we attach to the same error—instructional versus insufficient evidence—could lead to diametrically opposed outcomes (affirmance in the former if the instructional error is harmless beyond a reasonable doubt, but automatic reversal in the latter). Because "the substance, not the form, is what matters" (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 573), we conclude that the erroneous instruction does not limit the scope of our substantial evidence analysis.[2]

For these reasons, we conclude that the evidence was sufficient to sustain the gang enhancement as to the assault with the semi-automatic firearm count.

DISPOSITION

The judgment of conviction is affirmed.

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_____, J.

HOFFSTADT

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ

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[2] The instructional error is also not an independent ground for reversal. Misinstruction on an element is harmless beyond a reasonable doubt if the "element was uncontested and supported by overwhelming evidence." (*Neder, supra*, 527 U.S. at p. 17.) Here, as noted above, the primary activity element was not the subject of questioning or argument, and for that reason was uncontested; the evidence was also overwhelming.